89-551 (1)

NO.

IN THE UNITED STATES SUPREME COURT

October term, 1989

GEORGE JUSTICE MOOR,

Petitioner,

v.

THE CITY OF AUBURN HILLS,
MAURICE JAMES NOLIN,

Respondents.

On writ of certiorari
in the United States
Court of Appeals for
the sixth circuit

PETITION FOR WRIT OF CERTIORARI

GEORGE JUSTICE MOOR
502 S. Fox Hill Dr.
Blmfld Hills, MI 48013
tel. (313) 338-3996

Petitioner Pro Se

35 pp

STATEMENT OF QUESTIONS TO BE REVIEWED

Q1. Is it part of a police officer's duty to order peaceful citizens from a public street so a suspect can be questioned in private?

2. Should a citizen be subject to arrest for failing to leave a public street when so ordered by an officer who wants to question the citizen's son in private?

Q3. Should the court grant qualified immunity to a police officer on the grounds that a citizen's failure to vacate a public street when so ordered is the basis for a good faith arrest?

Q4. Do citizens have a clearly established right to remain on the public street when their children are being questioned by a police officer?

Q5. Should the court grant immunity to respondents based on a decision upholding the arrest even though a higher court later ordered the decision be "overturned and held for nought"?

Q6. Should the court first inquire about the constitutionality of the local ordinance under which petitioner was convicted before using the overturned jury decision as evidence of a good faith arrest by respondent officer Nolin?

Q7. Should the court first inquire about the adequacy of jury instruction before using the overturned jury decision as evidence of a good faith arrest by defendant officer?

Q8. Should the court first inquire if the alleged acts upon which petitioner's conviction was based constituted a crime before using the overturned decision as a basis for a good faith arrest by the respondents?

Q9. Did the federal court violate Supreme Court rules delineated in "Harlow v Fitzgerald" when it granted immunity to respondent officer based on acts that violated clearly established rights?

Q10. Did the state judge who presided at petitioner's criminal trial have a duty to inform the jury that citizens are not required to vacate the street when arbitrarely so ordered by a police officer?

Q11. Were petitioner's substantive constitutional rights violated when he was frisked, search, and seized without probable cause or warrant?

Q12. Should the conscience of the court have been shocked at the conduct of respondant officer?

Q13. Should the court have ruled that petitioner's arrest by respondent officer must have been without probable cause since there was no evidence supporting the charge?

LIST OF PARTIES

The plaintiff appellant in this case is George Justice Moor. He is a citizen of the United States and resides in the city of Bloomfield Hills in the state of Michigan.

The defendant respondent in this action is Maurice James Nolin who was employed as a police officer for the city of Auburn Hills which is a city located in the state of Michigan. To simplify the case, only the allegations against respondent Nolin will be argued.

TABLE OF CONTENTS

JUDGEMENTS TO BE REVIEWED

Petitioner seeks this Honorable Court to review the following judgements:

1. Page six of the May 27, 1989 order of the United States District Court in which judge DeMascio wrote "plaintiff conceeds *** that he was ordered *** to leave the site *** and refused to do so. This fact alone establishes a good faith basis for Nolin's arrest."

2. Pages six and seven of Judge DeMascio's May 27, 1989 decision in which he wrote "the juries guilty verdict, although overturned, also supports a finding of good faith."

3. Page seven of judge DeMascio's May 27, 1989 order in which he wrote, "The conduct alleged in the complaint, although certainly not condonable, is not such that 'shocks the conscience' of the court."

4. Page one of the June 6, 1989 order of the Sixth Circuit Court of Appeals where the decision stated, "*** the petition for rehearing has been referred to the original hearing panel. We affirm the judgement of the district court for the reasons stated in the district court's orders dated July 13, 1987 and May 27, 1988."

5. The July 19, 1989 order of the Sixth Circuit Court of Appeals where petitioner's petition for a rehearing was denied on the following grounds, "The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied."

JURISDICTIONAL STATEMENTS

The jurisdiction of this writ is based on " Rules of the Supreme Court 17.1c" which states that a valid jurisdictional ground is invoked "when a federal court of appeals has decided an important question of federal law *** in a way in conflict with applicable decisions of this Court."

Petitioner asserts that this court has forbidden federal courts to grant qualified immunity based on acts that violate clearly established rights and laws. Respondent officer Nolin's arrest of petitioner was based on the officer's arbitrary ordering of petitioner to vacate a public street so the officer could question petitioner's emotionaly disturbed son in private. This court has prohibited officers from arbitrarely ordering citizens from public streets and has stated that

citizens may ignore those orders without fear of legal reprisal. The respondent officer also caused petitioner to be searched, seized and arrested without probable cause or warrant which is clearly prohibited by the Constitution. Respondent officer also caused petitioner to be arrested for acts that, even if accepted as true, are not violations of law. Respondent officer also issued a false police report and offered purjured testimony at petitioner's criminal trial. All the acts are clearly prohibited and bar the federal courts from granting qualified immunity to respondent officer.

The jurisdiction of this writ is also based on "Rules of the Supreme Court" 17.1a which states a a valid jurisdictional claim is invoked "when a federal court of appeals has rendered a decision *** in conflict with the state court of last resort. Petitioner Moor claims that the

federal courts violated a high Michigan state court when it granted qualified immunity to respondant based on a decision that was "reversed and to be held for nought". The state court rendered its decision because they deemed the state trial to be unreliable and unfair. The federal courts are also in conflict with the state of Michigan high court's orders that declare that citizens have a right to have free and peaceful access to public streets, parks, and waterways.

INDEX OF AUTHORITY

1. Shuttlesworth v Birmingham; 394 US 147, 22 L Ed 2d 162, 89 S Ct 935.

"A law subjecting the exercise of first amendment freedoms of speech and assembly to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional".
22 L Ed 2d at 165

"A person faced with a licensing law that is unconstitutional as violating the right to freedom of speech may ignore such law and engage with impunity in the exercise of the right of free expression".
22 L Ed 2d at 164

"Governmental authorities have the duty and responsibility to keep their streets open and available for movement."
22 L Ed 2d at 165

"The priviledge of a citizen of the United States to use the streets and parks for communication *** must not in the guise of regulation be abridged or denied."
22 L Ed 2d at 165

"Even when the use of its public streets and sidewalks is involved, a municipality may not empower its *** officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, accorDing to their own opinions regarding the potential effect of the activity in question."
22 L Ed 2d at 165

2. Harlow v Fitzgerald, 457 US 800

"We therefore hold that government officials performing discretionary functions *** are shielded from liability *** insofar as their conduct does not violate clearly established *** rights ***."
457 US at 818

"In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party."
457 US at 816

3. King v Arabic, 159 Mich App 452 at 461.

"Trial judges should exercise great care in granting motions for summary judgement. A litigant has a right to a trial when there is the slightest doubt as to the facts."

4. Michigan Revised Judicature Act Public Nuisances 600.3801 note 6.

"To be a public nuisance the activity must *** prevent the public from the peaceful use of *** the public streets."

5. City of Auburn Hills ordinance 5(a) - interferring with police.

"No person shall resist a police officer, any member of the police department or any person duly empowered with police authority while in the discharge or apparent discharge of his duty, or any way interfere with or hinder him in the discharge of his duty".

6. Article 1 of U.S. Constitution.

"Congress shall make no law *** abridging freedom of speech, *** or the right of the people to peaceably to assemble, and to peition the government for a redress of grievances."

7. Article 4 of U.S. Constitution.

"The right of the people to be secure in their persons *** against unreasonable searches and seizures shall nót be violated and no warrant shall issue, but upon probable cause."

8. Article 14 of U.S. Constitution.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

9. Gregory v City of Chicago, 89 S Ct 946 (1969).

"*** the verdict of the jury for all we know may have been rendered on (an unconstitutional) ground alone, since it did not specify the basis on which it rested. It therefore follows here as in Stromberg *** that if one of the grounds for conviction is invalid under the Federal Constitution the judgement can not be sustained."

10. American Jurisprudence, sec 23.

"Where a person by words or conduct interferes in behalf of another, the offence of obstructing an officer will be

held committed where either actual force is used or a threat is made ***. But no offense is committed where force is neither used nor threatened, for instance, where a person quietly and peaceably asks questions to gai n information, or without any overt act to impede or intimidate the officer, protests against the arrest of another, or requests the release of an alleged offender."

FACTS OF THE CASE

Petitioner lived in Bloomfield Hills, Michigan with his wife Virginia, and his son, David. On the night of December 4, 1985 at 9:40 pm. a trespassing complaint was phoned in to the Auburn Hills police department regarding petitioner's son. Respondant officer Nolin was dispatched and en route to the scene found David Moor talking to witness Marie Gullett a block away from the complainant's house. Respondant officer Nolin ordered plaintiff's son to remain where he was until the officer returned from questioning the complainants.

Petitioner, as well as others had noticed strange behavior on David's part. Petitioner's son was so emotionaly distraught tha. he attempted suicide several days later. On pages 13 and 14 of David Moor's April 11, 1988 deposition (docket

nr#84) David was asked, "Is it safe to say that *** you were experiencing emotional problems?" Petitioner's son responded, "Yes, I was." He was then asked, " *** did you attempt suicide?" He responded, "Yes." Respondent officer Nolin was also aware of the emotional problems that petitioner's son was experiencing. In interrogatory #119 respondent officer Nolin testified (cf. docket nr#57) regarding a December 4, 1985 interview with the complainants. "The Cross' were all afraid of him (David). I recall a discussion regarding a possible joint suicide between David Moor and their daughter (David's girl friend)".

Petitioner's son, noticing that he did not have identification used witness Gullett's telephone to ask petitioner to bring his wallet to the scene. In item

nineteen of his affidavit (docket nr#83) petitioner testified that in the telephone conversation " *** David told me that officer Nolin was very rude to him and that David believed that officer Nolin wanted to pick a fight with him". On page 90 of the court transcript (docket nr#15) petitioner testified, "David told me that he believed the officer was interested in giving him a hard time." The offficer's rudeness was also noticed by witness Gullett who testified on pages 67 and 68 of the court transcript (docket nr#15) "*** the officer pulled up, got out of his car, came up to David *** and said, 'I want you to stay here, I gotta go talk to some people and I kept saying. 'Sir, sir *** '. He just would turn his back to me and walk back to his car. *** He completely ignored me." Petitioner Moor's first response to his son's story, according to pages 90 and 91 of the court transcript

(docket nr#15) was to ask, "David, what did you do wrong?" On page 98 of the same court transcript petitioner testified, '*** when I first went there I did not believe that officer Nolin was going to give David a hard time. I was afraid David was going to give officer Nolin a hard time. David had hit me the week before. He was violent". On page 100 of the same court transcript petitioner testified that he did not want his son to "to stike officer Nolin, commit assault, and go down the river for a few years."

Petitioner Moor arrived at witness Gullett's house and talked with her for about fifteen minutes. At 10:12 pm. respondent officer Maurice Nolin finished questioning the complainants and cleared thei r house (cf. police dispatcher report docket nr#19). Respondent officer Nolin drove his police car back to the Gullett residence and parked in the public

street. Respondent officer saw petitioner Moor, petitioner's son and witness Gullett speaking to eachother on witness Gullett's back porch. Respondent Nolin made a beckoning motion and both petitioner Moor and his son approached Nolin's police car. Respondent officer Nolin in his police report (docket nr#86) stated, "I parked in the street and motioned for David to come to my vehicle. *** George Moor followed and I asked him to leave so that I might speak with David. *** From that point on I could not complete a question *** without his father interrupting."

Petitioner Moor in pages 93 through 95 of the April 15, 1985 state court transcript (docket nr#15) testified that as he approached Nolin's police car, he stated, "I am David's father, why are you detaining my son here?" Officer Nolin facitiously asked if petitioner was David's lawyer and told petitioner to "Get

lost." When petitioner failed to respond to respondent officer Nolin's demand, petitioner was arrested for "interferring with an officer during the performance of his duties." Witness David Moor's account is similar and may be summarized from pages eight and nine of his April 11, 1988 deposition (docket nr#84) where he stated:

> A. " *** George Moor walked up and says, 'Why is my son being detained?' The officer *** replied, " *** Get lost! Do you want to be arrested?' George Moor commented, ' *** what for?' Then he (Nolin) proceeded to arrest him. *** He (George Moor) never made any statement for me not to cooperate.'
>
> Q. Do you believe officer Nolin had an opportunity to question you and make statements if he had so desired?
>
> A. He could have if he wanted to."

Witness Gullett offered no support to respondent officer Nolin's claim that petitioner Moor interferred with the officer's investigation. On page 71 of the April 15, 1986 transcript she testified, "*** he (Nolin) pulled up *** and motioned to come over to the car. *** Mr Moor

(petitioner) went *** and all I heard was, 'This is my son, why are you detaining him here? *** He (Nolin) frisked him (petitioner)."

On April 15, 1985 petitioner Moor was tried in a Michigan Court before the Hon. James Sheehy. Respondents produced no evidence supporting officer Nolin's charges. Chief of police Raynor testified that petitioner confessed that he was ordered to leave the public streets and failed to do so. Hon. James Sheehy did not instruct the jury that citizens have a right to peaceful access to public streets; nor did the judge comment on the prosecuting attorney's statement that anarchy would result if ciitizen's failed to obey the officer's orders. The Oakland Country Circuit Court reviewed the lower court decision and ordered the "decision overturned and to be held for nought."

ORIGINAL JURISDICTION

The first complaint sought pendant jurisdiction for state causes of action under false arrest, malicious prosecution, and negligence. In addition declaratory judgment was sought against the criminal proceedings that defendant Sheehy presided over, as well as the unconsitionality of the local obstruction ordinance under which petitioner was prosecuted. In the July 13, 1987 order the court rejected petitioners claim under the Declaratory Judgement act on the grounds that there was not an actual controversy regarding the court proceeding or the constitutionality of the local ordinance since petitioner did not stand in a present danger of being rearrested under the same charge. Although petitioner did not fear a rearrest under the local obstruction ordinance but did fear that the court would ac-

-cept, without review, the legality of both the local ordinance and the court proceedings and use both against the petitioner without review. This is exactly what the court did when it granted qualified immunity based on the state court proceedings under the local ordinance.

In the final amended complaint petitioner based his claim on 42 U.S.C 1983. Petitioner claimed that his First Amendment rights were violated in that he was arbitrarely ordered from the public streets when he was peacefully attempting to address grievences lodged by petitioner's son against a government official. Petitioner raised a claim under the Fourth Amendment claiming that his arrest was without any evidence and contrary to the only legal meaning of the local ordinance.

ARGUMENT OF CASE

1. The United States District Court in its May 27, 1989 order acknowledged that "the doctrine of qualified immunity protects an official's *** conduct where it does not violate clearly established *** rights." (cf. Harlow v Fitgerald, 457 US at 818).

2. There is a clearly established First Amendment right that allows citizens the peaceful use of public streets.

a). This right was enforced twenty three years ago under "Shuttlesworth v Birmingham" 86 S Ct 211.

b). The Court in its decision forbad officers from arbitrarely ordering citizens from public streets. In "Shuttlesworth" the court stated "*** a municipality may not empower its officials to roam essentially at will, dispensing or withholding permission to speak, (or) assemble *** according to their own opinions regarding

the potential effect of the activity in question." (22 L Ed 2d at 165). Respondant officer Nolin stated in his police report that he ordered petitioner to leave so that he might speak with David. In the same police report respondant stated that it was after ordering petitioner from the streets that he was interrupted in his attempts to question petitioner's son. It should be remembered that all witnesses denied respondent's assertion that petitioner interrupted the questioning of petitioner's son. The point being made is that even if we accept respondent's unsupported account, petitioner was arbitrarely ordered from the public streets and from that point on that the officer could not complete his questioning of petitioner's son. In respondent Nolin's answer to the first set of interrogatories (docket nr#42) he testified

"INTERROGATORY NUMBERED 83:

On the night of December 4, 1985 did you order George Moor to leave the scene before you attempted to ask David Moor a single question?

ANSWER:

Yes."

c). The Court in its "Shuttlesworth" decision asserted that keeping the streets open for public use was a governmental duty and obligation. In the "Shuttlesworth" case the Court stated, "Governmental authorities have the duty and responsibility to keep their streets open and available for movement" (22 L Ed 2d at 165). Petitioner recognizes that there are times when an officer has the duty to order citizens from the public streets. Respondent Nolin has never claimed a valid reason for ordering petitioner from the street. Respondent refused to answer an interrogatory that asked if he believed it to be a part of his duty to question suspects in private. Respondent refused to answer an interrogatory that asked if he

desired to question petitioner's son in private, did he consider questioning him in the privacy of his squad car or at the police station. When respondent officer Nolin ordered petitioner to vacate the streets so he could question petitioner's son in private, he not only violated petitioner's First Amendment rights but he also exceeded his authority and failed to perform his federal duty to keep the streets open for public use.

d). The Court has asserted that citiizens who refuse to relinquish constitutional rights under governmental pressure will suffer no legal reprisals for the assertion of those rights. The Courts stated, "A person faced with a *** law that is unconstitutional *** may ignore such law and engage with impunity in the exercise of the right ***" (cf. "Shuttlesworth", 22 L Ed 2d at 164). Petitioner had a valid concern over the mental unstability of his

son causing a crime of assault to be perpetrated on the officer. Petitioner asserted his right to peaceful access of the public streets to relay to the officer that petitioner's son feared that the officer sought to provoke a fight. This is covered under the First Amendment rights of freedom of speech and the right to assemble before government officials for an address of grievances. To grant immunity based on petitioner's refusal to relinquish his First Amendment rights sends a chilling message to citizens that citizens are fair game for governmental abuse if they do not volunteer to reliquish rights when the government so demands.

3. The federal courts have refused to acknowledge, let alone enforce petitioner's rights to peaceful access to the public streets. Petitioner's complaint claimed a violation of First Amendment rights, but no reference to these rights were men-

tioned when the court dismissed the complaint. Petitioner filed a motion for rehearing in the United States District Court in which the arguments presented in this petition were restated. The lower federal court denied the motion saying that petitioner stated no new argument. Petitioner claimed the same constitutional rights in the Federal Appeals Court where they upheld, without comment, the decision of the lower court. When petitioner filed a petition for rehearing in the appeals court, the court stated that they had originally considered the argument. The reason the federal courts have issued no comment on petitioner's claim that immunity can not be granted for acts violating petitioner's First Amendment rights is that the argument is self evident and the federal courts refuse to uphold those rights that only exist on paper. Even re-

spondent agreed that the right to peaceful access to public streets is a constitutional right. On page nine of respondent's appeal brief they state, "There is no question that appellant *** has a right to free access to public streets." It makes a mockery of the judicial system for the courts to grant immunity based on acts that all parties agree would be in violation of basic rights.

4. In its May 27, 1988 order the court stated, "The conduct alleged in the complaint although certainly not condonable, is not such that shocks the conscience of the court". The court further stated, "This is not a case which fits the other prong of substantive due process -- official acts which may not take place no matter what procedural protections accompany them." Petitioner alleged that on route to the police station he told

respondent officer Nolin that there was no probable cause to support his obstruction arrest (cf. Second amended complaint art. 31, docket nr#28). Petitioner claimed that Nolin gave a wink and said that by the time he finished writing the police report, there would be enough evidence -- he taunted petitioner that he would issue a false police report. Responent Nolin then went before a jury and commited perjury. His police report had not been introduced as evidence during the jury trial and it showed that he had lied to the jury. It was alleged that respondent wilfully violated petitioner's First Amendment right of free speach and assembly. It was shown that officer Nolin had previously had complaints of violence and lying that had been a factor in his being demoted multiple times. Surely this history of prior misconduct tends to show a pattern supporting petitioner's account.

The courts conscience should be shocked at the violation of rights and the commission of crimes perpetrated to protect an officer from disciplinary action. Filing false police reports, commiting perjury, and violating an individuals First Amendment rights qualifies as conduct that should not take place under any circumstance.

5. The court in its May 27, 1988 court order based its determination of a good faith arrest upon the jury's guilty verdict. This Court has in "Gregory v City of Chicago, 89 S Ct 946 (1969) stated that if the verdict of a jury could be based on an unconstitutional ground, that verdict may not be used. The Jury was not instructed that citizens have a right to peaceful access to public streets and are not required to vacate a street if the request is arbitrary. Petitioner believes the state judge who presided over the criminal proceeding lead the jury to believe that

no such right existed. Petitioner asserts that the jury was not properly instructed regarding the obstruction ordinance on the grounds that section 23 of American Jurisprudence specifically states that when a third party comes to the aid of another being arrested and merely asks questions, there is no basis for the third party being arrested for obstruction. A higher state court overturned the conviction and ordered all to "hold it for nought". The federal court should obey the higher state court order, especially since the federal court has refused to consider those allegations and declaratory remedies that would have examined the state court proceeding that lead to the jury conviction.

CONCLUSION

Petitioner Moor prays this honorable court to order petitioner's case against respondent officer Nolin to go to trial in the United States District Court located in Detroit, Michigan. Petitioner requests that this court state that immunity can not be granted to a law enforcement officer on the basis that petitioner failed to reliquish his right to have peaceful access to the public street where his emmotionaly disturbed son was being questioned.

Respectfully submitted by:

Justice Moor

89-551 (2)

NO.

IN THE UNITED STATES SUPREME COURT

October term, 1989

GEORGE JUSTICE MOOR,

Petitioner,

v.

THE CITY OF AUBURN HILLS,
MAURICE JAMES NOLIN,

Respondents.

On writ of certiorari
in the United States
Court of Appeals for
the sixth circuit

PETITION FOR WRIT OF CERTIORARI
APPENDIX WITH PROOF OF SERVICE

GEORGE JUSTICE MOOR
502 S. Fox hill dr
Blmfld Hills, Mi 48013
tel. (313) 338-3996

Petitioner Pro Se

14 pp

INDEX TO APPENDIX

FINDING OF FACTS

District Court Record Entry No. 108
Dated: May 27, 1988
Issuing court: UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
Caption:: GEORGE JUSTICE MOOR V CITY OF AUBURN HILLS, et al
Case No.: 87CV71293DT
(page 2)

*** Plaintiff alleges that on December 4, 1985 a complaint was filed with the City of Auburn Hills Police Department against his son. Officer Nolin was dispatched to the scene. Plaintiff thereafter arrived on the scene to provide his son with his wallet containing identification. When plaintiff identified himself to Nolin and asked why his son was being detained, Nolin allegedly ordered plaintiff to leave the scene so he could question plaintiff's son in private. ***. He apparently refused to leave and Nolin arested him for disorderly conduct; i.e., interfering with a police officer during the performance of his duties

(page 3)

***

On December 19, 1985 plaintiff pleaded not guilty to the charge of being a disorderly person. Trial on the charge commenced on April 15, 1986 in the Fifty Second District Court. Nolin apparently testified that he did not order plaintiff from the scene until after plaintiff thwarted his attempt to question plaintiff's son. *** The jury found plaintiff quilty of interfering with a police officer during the performance of his duties. The Oakland County Circuit Court reversed the conviction on January 27, 1987.

CONCLUSIONS OF LAW

District Court Record Entry No. 24
Dated: July 13, 1987
Issuing Court: UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION
Caption: GEORGE JUSTICE MOOR V CITY OF AUBURN HILLS, et al

Case No.: 87CV71239DT

(page 2)

Plaintiff filed his first amended complaint in this action on April 27, 1987.

Count I of the complaint alleges that defendants City of Auburn Hills, *** and Maurice James Nolin III deprived plaintiff of rights secured under the United States Constitution. This claim is based on 42 U.S.C 1983 and serves to invoke the jurisdiction of this court.

CONCLUSIONS OF LAW

District Court Record Entry No. 108
Dated: May 27, 1988
Issuing court: UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
Caption:: GEORGE JUSTICE MOOR V CITY OF AUBURN HILLS, et al
Case No.: 87CV71293DT

(page 4)

*** There is no question that defendant in this matter acted under color of state law.

(page 6)

Plaintiff also raises a substantive due process claim: i.e., that his fourth amendment right to be free from unreasonable search and seizure was violated by his arrest without probable cause. Before addressing the factual isue of probable cause, we must decide whether defendants are shielded by the doctrine of qualified immuntiy. ***

CONCLUSIONS OF LAW

The doctrine of qualified immunity protect an official's discretionary conduct where it "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *** The immunity "is pierced only if there clearly was not probable cause at the time the arrest was made. The officers must establish that they acted in good faith and had reasonable belief that their conduct was permissible." *** Plaintiff concedes in his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so. This fact alone establishes a good faith basis for Nolin's belief that he had probable cause to arrest plaintiff for interfering with a police officer. The jury's guilty verdict,

(page 7)

although overturned, also supports a finding of good faith. *** We conclude that Nolin is shielded by qualified immunity.

Plaintiff also alleges a claim under the eighth amendment. This claim presumably arises out of his allegations that he was frisked in public by Nolin and pushed into the back of a police car. *** Since plaintiff's conviction was reversed, his claim must be for deprivation of due process. *** This is not a case, however, which "fits the other prong of substantive due process -- official acts which 'may not take place no matter what procedural protections accompany them.'" *** The conduct alleged in the complaint although certainly not condonable, is not such that "shocks the conscience" of the court. This claim must also be dismissed.

OPINIONS OF STATE CRIMINAL PROCEEDINGS

District Court Record Entry No. 15
Dated: April 15, 1985
Issuing Court: STATE OF MICHIGAN, IN THE DISTRICT COURT FOR THE 52/3 JUDICIAL DISTRICT.
Caption: THE PEOPLE OF THE CITY OF AUBURN HILLS V. GEORGE JUSTICE MOOR
Case No.: CR86-DA=3560-AR
(page 130)

THE COURT: Based upon the jury verdict, the court'll enter a judgemnt of guilty in this case.

District Court Record Entry No. 41
Dated: Jan. 29, 1987
Issuing court: STATE OF MICHIGAN IN THE OAKLAND COUNTY CIRCUIT COURT
Caption: PEOPLE OF AUBURN HILLS V GEORGE JUSTICE MOOR
Case No.: 86-DA-3560-AR

This matter having come before the Court upon appeal of Defendant George Justice Moor, Plaintiff having appeared, the parties having submitted briefs, oral argument having been scheduled and conduct

ed, the Court having reviewed the briefs, heard the argument and rendered an opinion and the Court otherwise fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that Defendant-Appellant GEORGE JUSTICE MOOR's conviction of June 6, 1989 for Disorderly Person is reversed and hereby set aside and held for naught.

JUDGEMENTS TO BE REVIEWED

District Court Record Entry No. 27
Dated: May 27, 1988
Issuing court: UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
Caption: GEORGE JUSTICE MOOR V CITY OF AUBURN HILLS, et al
Case No. 87CV71293DT

(page 6)

xxx The immunity "is pierced only if there clearly was not probable cause at the time the arrest was made. The officers must establish that they acted in good faith and had reasonable belief that their conduct was permissible. xxx Plaintiff xxx was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so. This fact alone establishes a good faith basis for Nolin's belief that he had probable cause to arrest plaintiff for interfering with a police officer. The jury's guilty verdict

(page 7)

although overturned, also supports a finding of good faith. xxx We conclude that

JUDGEMENTS TO BE REVIEWED

Nolin is shielded by qualified immunity.

Plaintiff also alleges a claim under the eighth amendment. *** The conduct alleged in the complaint although certainly not condonable, is not such that "shocks the conscience" of the court. This claim must also be dismissed.

Dated: June 6, 1989

Issuing court: UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Caption: GEORGE J. MOOR V. CITY OF AUBURN HILLS; AUBURN HILLS POLICE DEPARTMENT ROBERT F RAYNOR; MAURICE JAMES NOLIN; JAMES P SHEEHY

Case No. 88-1685

Having carefully reviewed the record and having considered the arguments presented in the briefs, we affirm the judgment of the district court for the reasons stated in the district court's orders dated July 13, 1987 and May 27, 1988.

ORDERS ON REHEARING

District Court Record Entry No. 110
Dated: June 6, 1988
Re: May 27, 1989 order (nr#108)
Issuing Court: UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.
Caption: GEORGE MOOR V CITY OF AUBURN HILLS, et al
Case No. 87CV71293DT

Petitioner's motion is denied.

Dated: July 19, 1989
Re: June 6, 1989 order
Issuing court: UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.
Caption: GEORGE J MOOR V. CITY OF AUBURN HILLS, et al
Case No. 88-1685

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

AFFIDAVIT OF SERVICE

Petitioner, pursuant to Rule 28.5(c) affirms that he mailed to respondent's counsel a copy of this Appendix to the address and on the date noted on the accompanying Receipt for Certified Mail.

P 094 123 739

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to RICHARD PATTERSON	
Street and No 10 W. Square Lake	
P.O., State and ZIP Code Suite 300 Bloomfield Hills, Mi. 48013	
Postage	$ .45
Certified Fee	.75
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$ 1.30
Postmark or Date	

PS Form 3800 June 19[illegible]

DETROIT, MI 300 STA. AUG [illegible] 1989

Justice Moor

(3)

No. 89-551

In The

Supreme Court of the United States

October Term, 1989

GEORGE JUSTICE MOOR,

Petitioner,

vs.

CITY OF AUBURN HILLS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NO. 89-1685

RESPONDENTS' BRIEF IN OPPOSITION

– AND APPENDICES –

PATTERSON & PATTERSON, WHITFIELD, MANIKOFF,
WADDELL, MOORE AND WHITE, P.C.
By: RICHARD A. PATTERSON (P 18711)
Attorney for Respondents
10 West Square Lake Road, Suite 300
Bloomfield Hills, Michigan 48013
(313) 333-7941

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

32pp

COUNTER-STATEMENT OF QUESTIONS FOR REVIEW

Petitioner, who has filed his petition *in pro se*, has listed nine questions to be presented for review. These are somewhat argumentative and inartfully posed. However, they can all be distilled down into the following two questions:

1. DID THE DISTRICT COURT PROPERLY DISMISS THE PROCEDURAL DUE PROCESS CLAIM IN THAT THERE WAS NO DEPRIVATION OF A FEDERAL RIGHT WITHOUT DUE PROCESS OF LAW BY FINDING THERE WAS AN ADEQUATE STATE REMEDY?
2. DID THE DISTRICT COURT PROPERLY DISMISS THE SUBSTANTIVE DUE PROCESS CLAIM ON THE BASIS OF QUALIFIED IMMUNITY?

TABLE OF CONTENTS

INDEX TO AUTHORITIES CITED

CASE CITATIONS:

STATUTE:

MISCELLANEOUS:

No. 89-551

In The

Supreme Court of the United States

October Term, 1989

GEORGE JUSTICE MOOR,

Petitioner,

vs.

CITY OF AUBURN HILLS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
CASE NO. 89-1685

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Maurice James Nolin III and the City of Auburn Hills, respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the Sixth Circuit Opinion in this case, as none of the criteria of Supreme Court Rule 17 are present and there are no "special and important reasons therefor," as is argued more fully herein.

COUNTER-STATEMENT OF FACTS

It is difficult to properly respond to Petitioner's Statement of Facts. Virtually all of the statement is irrelevant to this appeal and a great portion of it is not supported anywhere in the record of this case.

Petitioner George Justice Moor was arrested by Auburn Hills Police Officer Maurice Nolin III on the evening of

December 4, 1985, for interfering with Officer Nolin in the performance of his duties.

A jury trial ensued April 15, 1986, resulting in a conviction. That conviction was appealed to the Oakland County Circuit Court and overturned on the basis that the appearance citation merely contained a conclusion of interference with a police officer without alleging adequate facts.

Subsequent to the reversal of the conviction Petitioner, among other things, filed the action in the Federal District Court for the Eastern District of Michigan.

COUNTER-STATEMENT OF THE CASE

On April 2, 1987, Petitioner, *in pro se*, filed a Complaint which was followed by a First Amended Complaint on April 27, 1987. On July 13, 1987, the Hon. Robert DeMascio, U.S. District Judge, on his own initiative, entered an order dismissing Counts II, V and VI of the First Amended Complaint with prejudice and Counts III and IV without prejudice (Respondents' Appendix B). This left only Count I of the Complaint which constituted a cause of action under 42 USC 1983, characterized as "constitutional and civil rights act violation."

The initial order dismissed Counts II and VI in that they requested declaratory relief and the Court determined there was not an "actual controversy."

Counts III and IV alleged causes of action for false arrest and malicious prosecution which the Court dismissed on the basis that, although they were within pendent jurisdiction, the state claims substantially predominated over the federal claim and should be resolved by the state courts.

Count V was dismissed in that it sought to impose civil liability for Officer Nolin's alleged perjured testimony during Petitioner's criminal trial.

On May 2, 1988, Defendants filed a motion for summary judgment. Pursuant to that, the District Court issued an Opinion dated May 27, 1988, together with a judgment dismissing Petitioner's Complaint (Respondents' Appendix C). An appeal was pursued by Petitioner to the United States Court of Appeals (6th Circuit), which upheld the District Court without oral argument on June 6, 1989 (Respondents' Appendix A).

SUMMARY OF ARGUMENT

Petitioner claims that his "civil rights" were violated. Much of his petition contains facts that are either unsupported by the record or irrelevant.

Basically, in order to prevail he must prove that he was either denied procedural or substantive due process. The law as to either of these criteria has been well established by this Honorable Court. He cannot successfully claim procedural due process in that there was an adequate state remedy. That is argued separately and in detail under Section 1 of the Argument, *infra*.

Secondly, as to substantive due process, Petitioner has failed to prove that there was either activity which would "shock the judicial conscience" under the doctrine of *Rochin* v *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 2d 183 (1952), or that Officer Nolin was not entitled to qualified immunity because he failed to exercise good faith.

Again, these considerations are discussed in Section 2 of the Argument, *infra*, entitled "Substantive Due Process."

ARGUMENT

PROCEDURAL DUE PROCESS CLAIM

I. THE DISTRICT COURT PROPERLY DISMISSED THE PROCEDURAL DUE PROCESS CLAIM IN THAT PETITIONER DID NOT DEMONSTRATE A DEPRIVATION OF A FEDERAL RIGHT WITHOUT DUE PROCESS OF LAW BECAUSE THERE WAS AN ADEQUATE STATE REMEDY.

Judge DeMascio in dismissing the procedural due process claim, stated at pages 4 and 5 (Respondents' Appendix pp C-2–C-4):

> "To state a cause of action under 42 U.S.C. Sec. 1983, plaintiff must allege that some person has deprived him of a federal right and that that person acted under color of state law. *Gomez* v *Toledo*, 446 U.S. 635 (1980). There is no question that defendants in this matter acted under color of state law. The question we decide is whether plaintiff has been deprived of a 'federal right.' It is somewhat difficult to decipher exactly what deprivations he complains of in his 18 page complaint. Given the dismissal of some of the claims in his first amended complaint, however, and constitutional provisions he cites, we discern two basic claims. The first claim arises out of his arrest; he essentially alleges that he was arrested without probable cause in violation of the fourth amendment and appears to allege that he was subjected to cruel and unusual punishment in violation of the eighth amendment. Plaintiff's second claim arises out of his trial on the disorderly conduct charge. He claims that Nolin's allegedly perjured testimony deprived him of his right to due process under the fifth

and fourteenth amendments. We will address the second claim first.

Plaintiff's fourteenth amendment claim essentially alleges a procedural, rather than a substantive deprivation. We assume for purposes of this motion that plaintiff has demonstrated that he was deprived of a protected liberty interest. He must allege and demonstrate, however, that such deprivation was without due process of law. *Bacon* v *Patera*, 772 F2d 259, 263-64 (6th Cir. 1985). Plaintiff has not alleged and the facts he recites do not suggest that his arrest was pursuant to an established policy or procedure of the city. We must, therefore, construe his claim as one alleging that Nolin's actions were random and unauthorized. To prevail on this type of claim, plaintiff must allege and demonstrate that his state remedies for such a deprivation are inadequate. *Bacon*, 772 F2d at 264; *Wilson* v *Beebe*, 770 F2d 578, 583-84 (6th Cir. 1985). If the state provides an adequate post-deprivation remedy, the deprivation was not 'without due process of law.' Plaintiff does not allege the inadequacy of state remedies. Indeed, plaintiff invoked such remedies in his first amended complaint. He clearly has access to a tort action for false arrest, false imprisonment, malicious prosecution and negligence. Although his remedies might be different from those available under section 1983, this does not render his state remedies inadequate. *Wilson*, 770 F2d at 583; *Davey* v *Tomlinson*, 627 F.Supp. 1458, 1464 (E.D. Mich. 1986). Plaintiff's procedural due process claims must, therefore, be dismissed."

The Judge, therefore, gave Petitioner the benefit of assuming he had been deprived of a protected liberty

interest and properly pointed out that he must allege and demonstrate a deprivation which was without due process of law.

This is the rule of *Parratt* v *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), as discussed in *Wilson* v *Beebe*, 770 F2d 578 (6th Cir. 1985). Judge Lively, writing for the Court pursuant to an en banc hearing, wrote at page 583:

> "In *Parratt* v *Taylor* (citation omitted) the Supreme Court established a limitation of the availability of section 1983 in procedural due process cases. Where the only violation complained of is a 14th amendment claim of deprivation of property without due process of law, the federal court must determine whether the state provides remedies for the tort which satisfy the requirements of procedural due process . . . if the state does provide a remedy which meets the standard, then the deprivation, though under color of state law, is not without due process of law. The state remedy need not be as complete as that which would have been provided by section 1983."

Petitioner could not successfully claim that there was an inadequate state remedy, as there clearly was. Not only was the District Court clearly correct in that determination; because of that consideration, it also properly declined pendent jurisdiction.

SUBSTANTIVE DUE PROCESS

II. THE DISTRICT COURT PROPERLY DISMISSED THE SUBSTANTIVE DUE PROCESS CLAIM BY DETERMINING THAT OFFICER NOLIN WAS ENTITLED TO QUALIFIED IMMUNITY AND THAT THERE WAS NO EGREGIOUS VIOLATION THAT WOULD SHOCK THE CONSCIENCE OF THE COURT.

As to this claim, Judge DeMascio stated at pages 6-7 of his Opinion (Respondents' Appendix pp. C-4 – C-5):

> "Plaintiff also raises a substantive due process claim; i.e., that his fourth amendment right to be free from unreasonable search and seizure was violated by his arrest without probable cause. Before addressing the factual issue of probable cause, we must decide whether defendants are shielded by the doctrine of qualified immunity. *Harlow* v *Fitzgerald*, 457 U.S. 800 (1982). The issue of immunity is purely a legal one. Id.; *Donta* v *Hooper*, 774 F2d 716 (6th Cir. 1985).
>
> The doctrine of qualified immunity protects an official's discretionary conduct where it 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow*, 457 U.S. at 818. The test is purely objective; the officer's subjective state of mind is not relevant. *Davey*, 627 F.Supp. at 1465. The immunity 'is pierced only if there clearly was not probable cause at the time the arrest was made. The officers must establish that they acted in good faith and had a reasonable belief that their conduct was permissible.' Id. (citations omitted). Although the facts in this case are not well developed, plaintiff concedes in

his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so. This fact alone establishes a good faith basis for Nolin's belief that he had probable cause to arrest plaintiff for interfering with a police officer. The jury's guilty verdict, although overturned, also supports a finding of good faith. While plaintiff ultimately was acquitted, the 'Constitution does not guarantee that only the guilty will be arrested. If it did, section 1983 would provide a cause of action for every defendant acquitted — indeed for every suspect released.' *Baker* v *McCollan*, 443 U.S. 137 (1979). We conclude that Nolin is shielded by qualified immunity. We need not address the claims against the other defendants because they cannot be held liable under a respondeat superior theory.

Plaintiff also alleges a claim under the eighth amendment. This claim presumably arises out of his allegations that he was frisked in public by Nolin and pushed into the back of a police car. We note that the eighth amendment prohibition against cruel and unusual punishment applies only to those convicted of a criminal offense. Since plaintiff's conviction was reversed, his claim must be for deprivation of due process. *Bell* v *Wolfish*, 441 U.S. 520 (1979). This is not a case, however, which 'fits the other prong of substantive due process — official acts which may not take place no matter what procedural protections accompany them.' *Beebe*, 770 F2d at 586. The conduct alleged in the complaint although certainly not condonable, is not such

> that 'shocks the conscience' of the court. This claim must also be dismissed."

Petitioner initially claims that the actions of Officer Nolin "shock the judicial conscience."

Judge DeMascio stated at page 2 of his Opinion (Respondent's Appendix pg. C-1):

> "The facts of this case are not well developed in the record. For purposes of this motion, we will assume as true the facts stated in plaintiff's second amended complaint."

And again at page 6 (Respondent's Appendix pg. C-4):

> "Although the facts in this case are not well developed, plaintiff concedes in his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so."

The Court did properly assume Plaintiff's Complaint was true and reviewed the facts in detail so far as they were presented and found that the action of the officer did not so qualify.

The "shocking the conscience" doctrine was articulated by this Court in *Rochin* v *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 2d 183 (1952).

Rochin involved this Court overturning a conviction of possession of narcotics which were obtained through extracting capsules from the defendant's stomach without his consent. Applying Constitutional standards to this, Justice Frankfurter stated at page 209:

> "Applying these general considerations to the circumstances in the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more

> than offend some fastidious, squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit Constitutional differentiation."

Certainly under the circumstances of this case, Petitioner cannot claim any such egregious deprivation to merit implementation of the *Rochin* "shocking of the conscience" doctrine.

The question then turns to whether or not there was a violation of a specific constitutional guarantee and whether or not Officer Nolin was entitled to immunity.

Petitioner asserts a violation of his constitutional right to be on the street, citing *Shuttlesworth* v *Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed. 2d 176 (1965).

A careful and thorough reading of the *Shuttlesworth* case does not support Petitioner and, in fact, supports Respondents' position. Defendant *Shuttlesworth* was charged with violation of two City of Birmingham, Alabama ordinances, sections 1142 and 1231, which state respectively:

> "It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city so as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any

> person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on; and
>
> It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

Regarding the second sentence of 1142, the Court said at 213 S.Ct.:

> "Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city . . .
>
> The matter is not one which need be exhaustively pursued, however, because, as the respondent correctly points out, the Alabama Court of Appeals has not read section 1142 literally, but has given to it an explicitly narrowed construction. The ordinance, that court has ruled 'is directed at obstructing the free passage over, on or along the street or sidewalk by the manner in which a person accused stands, loiters or walks thereupon. Our decisions make it clear the mere refusal to move on after a police officer requesting that person standing or loitering shall do so, is not enough to support the offense'.
>
> The Alabama Court of Appeals has thus authoritatively stated that section 1142 applies only when a person who stands, loiters or walks on a street or sidewalk so as to obstruct free passage refuses to obey a request by an officer to move on. It is our duty, of course, to accept this state judicial construction of the ordinance . . . as so construed we cannot say the ordinance is un-

> constitutional though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied."

There is no question Petitioner or any other person constitutionally has a right of free access to public streets within the limitations imposed by the legitimate police power of the state. The fact that Mr. Moor was on public property, to-wit: a street, if in fact that is where he was at the time of his arrest, has nothing to do with the offense with which he was charged. The charge was a violation of the Ordinance of Auburn Hills, Section 62.350, section 5(a), which reads:

> "INTERFERENCE WITH POLICE DEPARTMENT AND RELATED OFFENSES
>
> No person shall resist any police officer, any member of the police department, or any person duly empowered with police authority while in the discharge or apparent discharge of his duty, or in any way interfere with or hinder him in the discharge of his duty."

Therefore, the *Shuttlesworth* case is totally inapplicable in that Mr. Shuttlesworth was merely asked to leave a public street without the predicate of interfering with other peoples' right to free movement or a police officer in his duty.

Petitioner's citation of *Gregory* v *Chicago*, 394 U.S. 164, 89 S.Ct. 946 (1969) is most curious.

The holding of this Court was that the arrest of Dick Gregory and others during a civil rights march was violative of due process in that there was no evidence that the defendants were disorderly *and had not been charged with refusing to obey a police officer.* They were merely charged with holding a peaceful demon-

stration protected by the First Amendment. Chief Justice Warren stated at page 947:

> "However reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for refusal to obey a police officer."

A footnote to the opinion on the same page (947) states:

> "The Trial Judge charged solely in terms of the Chicago ordinance. Neither the ordinance nor the charge defined disorderly conduct as the refusal to obey a police officer."

Petitioner Moor was charged and convicted under an ordinance which specifically defined disorderly conduct as interfering with a police officer.

Mr. Moor's conviction was overturned in that the appearance citation given him was too vague. It had nothing to do with the constitutionality of the ordinance itself. Defendant Nolin did not order Mr. Moor from the street, but merely attempted to prevent his obvious interference with his duty to investigate a complaint.

Petitioner claims the ordinance is inconsistent with the right of citizens to have peaceful access to public streets. This argument totally misses the point that any exercise of a constitutional right must certainly be subject to the state's police power. While one has a right to travel and be in public places, they obviously cannot do that with impunity, i.e., they cannot drive an automobile on a public highway under the influence of alcohol or in excess of posted speeds.

There clearly was no violation of a specific substantive constitutional right.

Secondly, the District Court properly found that Officer Nolin acted in good faith and, therefore, had the benefit of immunity.

That determination is consistent with *Harlow* v *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982).

Justice Powell, writing for this Court in *Harlow*, stated at page 2738:

> "We therefore hold that governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable man should have known."

The general rule in applying *Harlow* is enunciated in *Floyd* v *Farrell*, 765 F2d 1 (1st Cir. 1985) at page 5, to the effect that an officer's immunity:

> "Is pierced only if there is clearly no probable cause at the time the arrest was made."

In *Flair* v *Fox*, 402 F.Supp. 818 (M.D. Tenn. 1975), it was stated at page 822:

> "The officers must establish they acted in good faith and had reasonable belief their conduct was reasonable."

Although Petitioner argues that he was arrested without "probable cause," good faith is more the issue than probable cause.

In 5 Am Jur 2d "Arrest" section 44, page 735, it is stated:

> "Probable cause for an arrest is defined as to be reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves

> to warrant a cautious man on believing the accused to be guilty. Many definitions using somewhat different wording have been used by the courts, but it has been said the substance of all of them is a reasonable ground for belief of guilt. To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith."

What we are dealing with here is more appropriately a good faith argument than actual probable cause, which is usually argued in the context of the issuance of a warrant. Under these circumstances, what occurred is an arrest without a warrant for which Officer Nolin had the power pursuant to MCLA 764.15; MSA 28.874, which states in part:

> "A police officer may without a warrant arrest a person in the following situations:
>
> (a) When a felony, misdemeanor or ordinance violation is committed in the police officer's presence."

The question of good faith is most adequately expressed in Judge DeMascio's Opinion, where he stated at page 6 (Respondents' Appendix pp. C-4–C-5):

> "Although the facts of this case are not well developed, Plaintiff concedes in his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so. This fact alone establishes a good faith basis for Nolin's belief that he had probable cause to arrest plaintiff for interfering with a police officer. The jury's guilty

verdict, although overturned, also supports a finding of good faith."

Therefore, as to the substantive due process claim, the Court properly found that Defendant Nolin was cloaked with qualified immunity and further properly found no evidence of a lack of good faith.

CONCLUSION

The Supreme Court rules provide for the considerations governing review on Certiorari. These considerations are contained in Supreme Court Rule 17. That rule states, in summary, that Certiorari will only be granted when there are "special and important reasons therefor." This statement is further amplified by subparagraphs (a) through (c), which delineate the character of those important reasons.

Those presuppose a conflict between the Federal Courts of Appeal and/or a state court or, at the very least, an instance where a state or federal court has decided an important question of federal law which has not been and should be settled by this Court. As is clear from the argument previously presented, no such criteria exists in this case.

Two federal courts, the District Court for the Eastern District of Michigan and the U.S. Sixth Circuit Court of Appeals, have reviewed this matter and decided the case in harmony with existing precedent from this Court. Certiorari under these circumstances is not

appropriate, and we respectfully request that this Court deny the petition.

Respectfully submitted,

PATTERSON & PATTERSON, WHITFIELD, MANIKOFF, WADDELL, MOORE AND WHITE, P.C.

By: /s/ RICHARD A. PATTERSON (P18711)
Attorney for Respondents
10 West Square Lake Road, Suite 300
Bloomfield Hills, Michigan 48013
(313) 333-7941

DATED: November 20, 1989

APPENDICES TO BRIEF IN OPPOSITION

• • •

APPENDIX A

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals – Sixth Circuit)

(Filed June 6, 1989)

(GEORGE J. MOOR, Plaintiff-Appellant, v. CITY OF AUBURN HILLS; AUBURN HILLS POLICE DEPARTMENT; ROBERT F. RAYNOR, individually and as Police Chief for the City of Auburn Hills; MAURICE JAMES NOLIN, individually and as Police Officer for the City of Auburn Hills; JAMES P. SHEEHY, individually and as Magistrate for the State of Michigan, Defendants-Appellees — No. 88-1685; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: MERRITT and MARTIN, Circuit Judges; and LIVELY, Senior Circuit Judge.

George Moor appeals from an order granting summary judgment in favor of the City of Auburn Hills, the Auburn Hills Police Department, Police Chief Robert Raynor, Officer Maurice Nolin, and James Sheehy, a magistrate for the State of Michigan. Moor claimed that the defendants violated his constitutional rights to

substantive and procedural due process and that they subjected him to false arrest and malice prosecution. Moor argues that the court erred dismissing counts II through VI of his complaint in an order dated July 13, 1987 and in granting summary judgment dismissing count I of his complaint by an order dated May 27, 1988.

Having carefully reviewed the record and having considered the arguments presented in the briefs, we affirm the judgment of the district court for the reasons stated in the district court's orders dated July 13, 1987 and May 27, 1988.

APPENDIX B

DISTRICT COURT ORDER OF JULY 13, 1987

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated July 13, 1987)

(GEORGE JUSTICE MOOR, Plaintiff, v. CITY OF AUBURN HILLS, a municipal corporation, et al., Defendants — Civil No. 87CV71239DT; Hon. Robert E. DeMascio)

Plaintiff filed his first amended complaint in this action on April 27, 1987. Plaintiff alleges six counts against defendants, purportedly based on both state and federal law, all arising from plaintiff's arrest and prosecution for disorderly conduct. Plaintiff alleges that his conviction for this offense was reversed by the Oakland County Circuit Court. For the reasons stated herein, we now dismiss counts II through VI of the first amended complaint.

Count I of the complaint alleges that defendants City of Auburn Hills, City of Auburn Hills Police Department, Robert F. Raynor, and Maurice James Nolin III deprived plaintiff of rights secured under the United States Constitution. This claim is based on 42 U.S.C. § 1983 and serves to invoke the jurisdiction of this court. Count II of the complaint seeks a declaration that the Auburn Hills municipal ordinance under which plaintiff was prosecuted be declared unconstitutional. Count VI asks this court to declare that the conduct of the state district court trial judge who presided over plaintiff's trial was violative of plaintiff's constitutional rights. Clearly, plaintiff has no standing to pursue either of the claims contained in counts II

and VI against the defendants. He cannot credibly allege that he will again be arrested under the challenged ordinance and brought before the same trial judge. *See Los Angeles* v. *Lyons*, 103 S.Ct. 1660 (1983). As such, neither of these claims present an "actual controversy" under the Declaratory Judgment Act.

Count III of the complaint pleads a cause of action for false arrest and imprisonment. Count IV purports to state a claim for malicious prosecution. Both of these claims arise under state law and are within the pendent jurisdiction of this court. We find, however, that these claims substantially predominate over the federal claim and thus should be resolved by the state courts. *See Winterhalter* v. *Three Rivers Motors Company*, 312 F.Supp. 962, 963-64 (W.D. Pa. 1970). Accordingly, counts III and IV of the first amended complaint are dismissed without prejudice to plaintiff's right to refile these claims in state court.

Finally, count V of the complaint seeks to impose criminal penalties upon Officer Nolin for his role in testifying at plaintiff's trial. This claim is purportedly based on 42 U.S.C. § 1988. Clearly, this provision does not support the relief requested by plaintiff. Accordingly, count V of the complaint must be dismissed. Plaintiff may, however, amend count I of his complaint to seek recovery of attorney fees actually incurred in defending his state court prosecution as a foreseeable result of Officer Nolin's allegedly perjured testimony. *See Lykken* v. *Vaveck*, 366 F.Supp. 585, 597 (D. Minn. 1973).

NOW, THEREFORE, IT IS ORDERED that count II, count V and count VI of the first amended complaint be and the same hereby are DISMISSED with prejudice;

IT IS FURTHER ORDERED that count III and count IV of the first amended complaint be and the same hereby is DISMISSED without prejudice;

IT IS FURTHER ORDERED that plaintiff file an amended complaint within 10 days of the date of this order setting forth only his claim under 42 U.S.C. § 1983 against the four defendants named in count I, if he wishes to pursue this claim.

/s/ Robert E. DeMascio
United States District Judge

Dated: July 13, 1987

(Certification Omitted)

APPENDIX C

DISTRICT COURT ORDER OF MAY 27, 1988

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated May 27, 1988)

(GEORGE JUSTICE MOOR, Plaintiff, v. CITY OF AUBURN HILLS, et al., Defendants — Civil No. 87CV71239DT; Hon. Robert E. DeMascio)

Plaintiff commenced this action, *pro se*, in April 1987. In his first amended complaint, plaintiff alleged six counts against defendants arising from his arrest and prosecution for disorderly conduct. By order dated July 13, 1987, this court dismissed counts II through VI of the complaint. Plaintiff thereafter amended count I of the complaint, which is based upon 42 U.S.C. § 1983. All defendants now move for summary judgment on that remaining count.

The facts of this case are not well developed in the record. For the purposes of this motion, we will assume as true the facts stated in plaintiff's second amended complaint. Plaintiff alleges that on December 4, 1985 a complaint was filed with the City of Auburn Hills Police Department against his son. Officer Nolin was dispatched to the scene. Plaintiff thereafter arrived on the scene to provide his son with his wallet containing identification. When plaintiff identified himself to Nolin and asked why his son was being detained, Nolin allegedly ordered plaintiff to leave the scene so he could question plaintiff's son in private. Plaintiff requested to be present during questioning but again was ordered to leave the scene. He apparently refused to

leave and Nolin arrested him for disorderly conduct; i.e., interfering with a police officer during the performance of his duties. Nolin thereafter transported plaintiff to the police station where he was processed.

On December 19, 1985, plaintiff pleaded not guilty to the charge of being a disorderly person. Trial on the charge commenced on April 15, 1986 in the Fifty Second District Court. Nolin apparently testified that he did not order plaintiff from the scene until after plaintiff thwarted his attempts to question plaintiff's son. Plaintiff alleges that Nolin also testified, or implied, that plaintiff had been drinking and uttered vulgarities at the scene. Plaintiff denies any drinking or vulgar language. Plaintiff testified in his own behalf and called three other witnesses. The jury found plaintiff guilty of interfering with a police officer during the performance of his duties. The Oakland County Circuit Court reversed the conviction on January 27, 1987.

Plaintiff alleges that defendant Nolin violated his rights under the first, fourth, fifth, eighth and fourteenth amendments and that the chief of police, the police department and city are vicariously liable for Nolin's conduct. Defendants now move for summary judgment on the ground that they are immune from liability under state law. The motion fails to address the federal nature of plaintiff's complaint and gives little, if any, guidance to the court in this matter. The court has reviewed the amended complaint and file in this matter, however, and concludes that plaintiff's complaint must be dismissed.

To state a cause of action under 42 U.S.C. § 1983, plaintiff must allege that some person has deprived him of a federal right and that that person acted under color of state law. *Gomez* v. *Toledo*, 446 U.S. 635 (1980). There is no question that defendants in this matter

acted under color of state law. The question we decide is whether plaintiff has been deprived of a "federal right." It is somewhat difficult to decipher exactly what deprivations he complains of in his 18-page complaint. Given the dismissal of some of the claims in his first amended complaint, however, and constitutional provisions he cites, we discern two basic claims. The first claim arises out of his arrest; he essentially alleges that he was arrested without probable cause in violation of the fourth amendment and appears to allege that he was subjected to cruel and unusual punishment in violation of the eighth amendment. Plaintiff's second claim arises out of his trial on the disorderly conduct charge. He claims that Nolin's allegedly perjured testimony deprived him of his right to due process under the fifth and fourteenth amendments. We will address the second claim first.

Plaintiff's fourteenth amendment claim essentially alleges a procedural, rather than a substantive deprivation. We assume for purposes of this motion that plaintiff has demonstrated that he was deprived of a protected liberty interest. He must allege and demonstrate, however, that such deprivation was without due process of law. *Bacon* v. *Patera*, 772 F.2d 259, 263-64 (6th Cir. 1985). Plaintiff has not alleged and the facts he recites do not suggest that his arrest was pursuant to an established policy or procedure of the city. We must, therefore, construe his claim as one alleging that Nolin's actions were random and unauthorized. To prevail on this type of claim, plaintiff must allege and demonstrate that his state remedies for such a deprivation are inadequate. *Bacon*, 772 F.2d at 264; *Wilson* v. *Beebe*, 770 F.2d 578, 583-84 (6th Cir. 1985). If the state provides an adequate post-deprivation remedy, the deprivation was not "without due process of law." Plaintiff does not allege the inadequacy of state

remedies. Indeed, plaintiff invoked such remedies in his first amended complaint. He clearly has access to a tort action for false arrest, false imprisonment, malicious prosecution and negligence. Although his remedies might be different from those available under § 1983, this does not render his state remedies inadequate. *Wilson*, 770 F.2d at 583; *Davey* v. *Tomlinson*, 627 F.Supp. 1458, 1464 (E.D. Mich. 1986). Plaintiff's procedural due process claims must, therefore, be dismissed.

Plaintiff also raises a substantive due process claim; i.e., that his fourth amendment right to be free from unreasonable search and seizure was violated by his arrest without probable cause. Before addressing the factual issue of probable cause, we must decide whether defendants are shielded by the doctrine of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The issue of immunity is purely a legal one. *Id.*; *Donta* v. *Hooper*, 774 F.2d 716 (6th Cir. 1985).

The doctrine of qualified immunity protects an official's discretionary conduct where it "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The test is purely objective; the officer's subjective state of mind is not relevant. *Davey*, 627 F.Supp. at 1465. The immunity "is pierced only if there clearly was not probable cause at the time the arrest was made. The officers must establish that they acted in good faith and had a reasonable belief that their conduct was permissible." *Id.* (Citations omitted.) Although the facts in this case are not well developed, plaintiff concedes in his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so. This fact alone establishes a good faith basis for Nolin's belief that he had probable cause to arrest plaintiff for inter-

fering with a police officer. The jury's guilty verdict, although overturned, also supports a finding of good faith. While plaintiff ultimately was acquitted, the "Constitution does not guarantee that only the guilty will be arrested. If it did, section 1983 would provide a cause of action for every defendant acquitted — indeed for every suspect released." *Baker* v. *McCollan*, 443 U.S. 137 (1979). We conclude that Nolin is shielded by qualified immunity. We need not address the claims against the other defendants because they cannot be held liable under a respondeat superior theory.

Plaintiff also alleges a claim under the eighth amendment. This claim presumably arises out of his allegations that he was frisked in public by Nolin and pushed into the back of a police car. We note that the eighth amendment prohibition against cruel and unusual punishment applies only to those convicted of a criminal offense. Since plaintiff's conviction was reversed, his claim must be for deprivation of due process. *Bell* v. *Wolfish*, 441 U.S. 520 (1979). This is not a case, however, which "fits the other prong of substantive due process — official acts which 'may not take place no matter what procedural protections accompany them.'" *Beebe*, 770 F.2d at 586. The conduct alleged in the complaint although certainly not condonable, is not such that "shocks the conscience" of the court. This claim must also be dismissed.

We conclude that plaintiff has failed to adequately allege a procedural due process violation and that his substantive due process claims are barred by the doctrine of qualified immunity. Plaintiff's complaint will be dismissed.

IT IS SO ORDERED.

/s/ Robert E. DeMascio
Senior United States District Judge

Dated: May 27, 1987

(Certification Omitted)

JUDGMENT

This cause comes before the court on defendants' motion for summary judgment, and the court having filed its Order,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED

that defendants' motion be and the same hereby is GRANTED and plaintiff's complaint is hereby DISMISSED.

Dated at Detroit, Michigan, this 27th day of MAY, 1988.

/s/ Robert E. DeMascio
Senior United States District Judge

(Certification Omitted)